



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Attorney General

DIVISION OF PUBLIC ADVOCACY
ENVIRONMENTAL PROTECTION BUREAU

April 11, 2005

VIA OVERNIGHT MAIL

T.H. Gilmour
Rear Admiral, U.S. Coast Guard
Assistant Commandant, Marine Safety, Security
and Environmental Protection
2100 Second Street, SW
Room 1417
Washington, DC 20593-0001

Dear Admiral Gilmour:

On July 14, 2004, seven Great Lakes States and Great Lakes United petitioned the Secretary of the U.S. Department of Homeland Security and the Commandant of the U.S. Coast Guard to take timely, effective action to comply with applicable provisions of NANPCA/NISA, 16 U.S.C. §4701 *et seq.* The petition sought the discontinuance of the practice of allowing invasive species-containing ballast water discharges to the Great Lakes by vessels declaring no ballast on board ("NOBOB"). Specifically, petitioners requested the Secretary and the Commandant to take the following action within 60 days of the filing of the petition:

- A. Initiate a proceeding by issuance of a proposed rule, and a schedule for the final rule, to amend the regulations concerning mandatory ballast water management for the control of nonindigenous species in the Great Lakes and the Hudson River, at 33 C.F.R. Part 151, Subpart C, in such a way as to conform to the requirements of the applicable provisions of NANPCA/NISA, codified at 16 U.S.C. §§4711(b)(2)(A) and 4711(b)(2)(B), or take other effective action to comply with the statutory mandate and close the NOBOB loophole;
- B. Inform the masters of all vessels equipped with ballast water tanks that these regulations as amended shall, consistent with NISA, eliminate the NOBOB exemption, and that

certification of strict compliance with said regulations, as amended, shall be required for said vessels' operation in the Great Lakes; and

- C. Rescind any oral or written guidance previously provided to the masters, or other responsible officers, of vessels equipped with ballast water tanks entering the Great Lakes, that differ from the regulations which, as amended, eliminate the NOBOB interpretation, exception and/or practice.

July 14, 2004 Petition, pp. 14-15 (copy attached).

Nine months have passed, another season of transoceanic vessels entering the Great Lakes is upon us, and the Coast Guard has not taken any of the actions requested by petitioners. It is now more than eight years since Congress required that regulations to prevent the introduction and spread of aquatic nuisance species "shall apply to all vessels equipped with ballast water tanks that enter a United States port on the Great Lakes after operating on the waters beyond the exclusive economic zone," 16 U.S.C. §4711(b)(2)(A). As explained in the House of Representatives Report accompanying H.R. 3217, which became NISA:

NISA amends section 1101(b)(2) of NANPCA to remove any uncertainty regarding the applicability of the current Great Lakes regulations to all vessels equipped with ballast water tanks, regardless of whether they are currently carrying ballast or the amount of ballast in their tanks.

H.Rep.No. 104-815, 104th Cong. 2d Sess. 15 (1996) (emphasis added).

Despite petitioners' request that Congress' clear command be followed, the Coast Guard's regulatory program for the Great Lakes continues to exempt from any ballast water management requirements all ballast water tank-equipped vessels claiming NOBOB. Vessels claiming NOBOB comprise the vast majority of transoceanic ships entering the Great Lakes. There is little, if any, dispute that these vessels' ballast water discharges are the main vector for aquatic invasive species introductions to the Great Lakes.

Not only has the Coast Guard failed to comply with NISA, the Coast Guard has in fact officially confirmed its illegal policy. Contrary to petitioners' requests that the Coast Guard inform the masters or responsible officers of incoming vessels of the elimination of the NOBOB exception/interpretation, the Coast Guard has perpetuated it, while at the same time confirming that it has no basis in fact. Effectively rejecting our petition, the Coast Guard's recent Federal Register notice announces that vessels claiming NOBOB status are not required to comply with Great Lakes regulations.

Only vessels carrying pumpable ballast water that enter the Great Lakes after operating outside the U.S. Exclusive Economic Zone are required to comply with the Great Lakes ballast water management requirements found in 33 C.F.R. Part 151, subpart C. As a large number of vessels that call on the Great Lakes arrive with No Ballast on Board (NOBOB), they are not required to comply with these requirements.

70 Fed.Reg. 1449 (January 7, 2005).

The notice also, however, acknowledges that these vessels do indeed carry ballast water in their tanks that when discharged threatens the Great Lakes with nonindigenous species ("NIS") introductions.

However, NOBOBs have the potential to carry NIS in their empty tanks via residual ballast water and/or accumulated sediments. Once NOBOBs enter the Great Lakes and take up ballast water, this water may mix with the residual water and sediments and if discharged into the Great Lakes, may provide a mechanism for NIS to enter the Great Lakes.

Id. The Coast Guard's continuing refusal to regulate these purported NOBOB vessels is contrary to the plain wording of the statute, its legislative history, and even the Coast Guard's own regulations.

The Coast Guard's reference in recent correspondence to NISA's requirement that Great Lakes regulations "take into consideration different operating conditions" is not a legitimate basis for the complete lack of regulatory control with respect to the ballast water of most transoceanic vessels operating in the Great Lakes. NOBOB vessels can and should conduct ballast water exchange, taking on 100 to 200 tons of seawater, allowing it to mix with residual ballast water, and then discharging the mixture. (This technique is often called "swish and spit."). Such exchange is reasonably effective, at least as an interim measure that all NOBOBs could implement immediately, and would bring these vessels into regulatory compliance as other ballast water management strategies are being explored. Some vessels have already practiced this type of exchange, as we pointed out in our letter to the Coast Guard dated August 19, 2004.

The idea that NOBOBs are inherently different due to "different operating conditions" has no basis in fact. NOBOBs are ships like any other ships. The only difference is quantitative: they have chosen to carry so much cargo into the Great Lakes that they cannot safely comply with existing U.S. ballast water regulations. In each case, the owners or operators of these ships have

made a market decision to carry 100% of their cargo capacity. U.S. regulatory agencies have not challenged these market decisions, despite the clear requirements of 16 U.S.C. §4711(b)(2)(E) and 33 C.F.R. §151.1506 that vessels may not be operated on the Great Lakes unless the U.S. ballast water regulations have been met. As a consequence, NOBOB owners and operators have been effectively rewarded for their market decisions to carry full loads of inbound cargo. They are able to evade existing regulatory requirements and are able to externalize the costs of any invasive species they carry in their residual ballast water.

We regret that the Coast Guard has been unwilling to address this issue in a timely and effective manner. Rather than take the specific, timely actions requested by petitioners, the Coast Guard instead has taken affirmative action to perpetuate the NOBOB fallacy that is at the heart of the current illegal regulatory void.

As stated in our letter to you dated November 23, 2004, the Coast Guard's latest non-specific, open-ended proposal to request comments and hold a meeting is too little, too late, and simply insufficient to resolve a NOBOB problem that never should have been a problem had the law been followed. We are keenly disappointed that the Coast Guard has in substance denied our petition. The petitioners must now consider other options to address the ongoing, serious invasive species threat to the Great Lakes posed by the Coast Guard's inaction.

Very truly yours,

FOR THE STATE OF NEW YORK
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See next page for additional signatories.

cc: Bivan Patnaik, w/ enclosure
Docket USCG-2004-19842

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